Filed 8/23/16 P. v. Robinson CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. VERNON KENNETH ROBINSON, JR., Defendant and Appellant.	F072479 (Fresno Super. Ct. No. F13906796) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Fresno County. Glenda Allen-Hill, Judge.

Allan E. Junker, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Clara M. Levers, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Gomes, Acting P.J., Detjen, J. and Franson, J.

Defendant Vernon Kenneth Robinson, Jr., appeals from a judgment following a plea of no contest. He contends the trial court breached the terms of his plea agreement. The People concede and we agree. We vacate the sentence and remand for further proceedings.

PROCEDURAL HISTORY

On June 18, 2014, defendant pled no contest to corporal injury to a spouse or cohabitant (Pen. Code, § 273.5, subd. (a);[1] amended count 1, a felony) and cruelty to a child by inflicting unjustifiable physical pain and mental suffering (§ 273a, subd. (b); count 5, a misdemeanor). According to the negotiated plea, count 1 would be reduced to a misdemeanor on defendant's completion of a 52-week batterer's treatment program. The remaining counts were dismissed. The trial court instructed defendant to provide proof of enrollment in the program at the next hearing.

On July 18, 2014, defendant had not yet enrolled in the program. The trial court agreed to set a program completion date, as the original plea agreement did not include one. The court stated that defendant must complete the program by September 30, 2015, as a condition of the plea agreement. The court also told defendant he would need to enroll by October 10, 2014, to be able to complete the program in time. The next hearing was set for October 10, 2014.

On October 10, 2014, defendant failed to appear and a bench warrant was issued.

On October 27, 2014, defendant did not provide adequate proof of enrollment, but he said his first class was on October 23, 2014. The trial court ordered defendant to provide proof of enrollment on December 8, 2014.

On December 8, 2014, defendant did not provide proof of enrollment, purportedly because the program director had a family emergency. The trial court continued the matter until December 22, 2014.

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[1] All statutory references are to the Penal Code unless otherwise noted.

On December 22, 2014, defendant provided the court a progress report showing he was enrolled in the program. He had completed five of the 52 sessions. The next hearing was set for March 23, 2015.

On March 23, 2015, defendant provided a report showing he had completed 12 of the 52 sessions. The parties agreed with the trial court's suggestion to set the sentencing hearing for March 21, 2016, so defendant would have time to complete the program. The court authorized defendant to have church counseling with his children, and set review hearings for June 22, 2015, and August 31, 2015.

On June 22, 2015, defendant provided the trial court a letter showing he had been attending church counseling with his children. Defendant told the court, however, that he was no longer enrolled in the program because he had lost his job due to his many court appearances and was no longer able to pay for the program sessions. The prosecutor argued defendant had failed to attend the program as he had been instructed; keeping his job was no longer a reason for reducing the felony to a misdemeanor; and he should be placed on probation immediately, with completion of the program as a condition, and with the prospect of reduction to a misdemeanor in the future. Defendant asked to address the court, but was denied. The court noted it had made clear to defendant that his deadline for completion was September 30, 2015, which would now be impossible to meet. The court told defendant he would be sentenced on August 5, 2015, and he might or might not get credit for the sessions he had attended.

On August 5, 2015, the trial court suspended imposition of sentence and placed defendant on felony probation for four years. Defendant represented that he had completed 23 sessions of the program. As a term of probation, the court ordered him to restart and complete the program, as well as a 52-week child abuser's program. The court refused to give defendant credit for the 23 sessions he claimed to have completed.

On October 8, 2015, defendant filed a notice of appeal; his request for a certificate of probable cause was granted.

DISCUSSION

The parties agree that on July 18, 2014, the trial court modified the plea agreement by adding a program completion date of September 30, 2015. And they agree that on March 23, 2015, the court again modified the plea agreement by changing the program completion date to March 21, 2016. As the parties recognize, these modifications of the plea agreement were authorized and the new terms were binding (*People v. Segura* (2008) 44 Cal.4th 921, 930-931 [plea agreement is a binding contract when the parties and the court agree on the terms], 935 [terms of plea agreement may be modified by the court when both parties expressly agree to the modification]).

The parties further agree that on June 22, 2015, the court mistakenly cited September 30, 2015, as the program completion date, in spite of the court's subsequent modification of that term of the plea agreement to March 21, 2016. And they agree that the court breached the plea agreement on August 5, 2015, when it sentenced defendant under terms contrary to the agreement.

Finally, the parties agree that it is appropriate to specifically enforce the original plea agreement, provided it does not bind the trial court to an unsuitable disposition. (*People v. Mancheno* (1982) 32 Cal.3d 855, 861 ["Specific enforcement is appropriate when it will implement the reasonable expectations of the parties without binding the trial judge to a disposition that he or she considers unsuitable under all the circumstances."].) Defendant suggests we vacate the sentence and allow him 12 months to either continue and complete the program, or restart and complete the program. The People believe the latter is appropriate. But in our opinion, that arrangement does not return defendant to his position at the time of the court's breach of the plea agreement. Mandated attendance in, and payment for, such a program is undoubtedly a hardship, and we believe defendant should have the option of receiving credit for the sessions he had already attended at the time of breach. Accordingly, we vacate defendant's sentence and remand with directions

that defendant be given 12 months to either resume where he left off and complete the program, or restart and complete the program, as he so chooses.

DISPOSITION

The judgment of conviction is affirmed, but the sentence is vacated and the matter remanded to the trial court with the following instructions: Defendant shall be provided 12 months for the completion of a batterer's treatment program. He shall be given the choice of resuming the program where he left off on August 5, 2015, when the trial court breached the plea agreement (defendant's resumption of the program shall be based on documentation of his completed sessions), or beginning a new program. Under either scenario, defendant shall not be required to pay for sessions he has already attended and paid for. Upon successful completion of the program, defendant's felony conviction (§ 273.5, subd. (a)) shall be reduced to a misdemeanor in accordance with the plea agreement. If defendant fails to successfully complete the program, the matter is remanded to the trial court for resentencing within its discretion.